No. 87-378

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

IN RE "AGENT ORANGE"
PRODUCT LIABILITY LITIGATION

sub nom. NEWTON B. SCHWARTZ., P.C. et al. and
JOHN M. QUINN, P.C. et al.,

Petitioners,

vs.

DAVID DEAN,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

RESPONDENT'S BRIEF IN OPPOSITION

LEON FRIEDMAN
HOFSTRA LAW SCHOOL
Hempstead, New York 11550
(212) 737-0400
Counsel for Respondent
Attorney of Record

QUESTIONS PRESENTED

1. Was the Court of Appeals for the Second Circuit correct in holding that a fee-sharing arrangement (under which attorneys would be paid on the basis of a multiple [300%] of money advanced for expenses) was invalid when it had the effect of awarding one counsel twelve times the amount that the district court held he was entitled to on the basis of his actual legal services contributed.

2. Was the Court of Appeals correct in holding that a fee-sharing arrangement in a class action suit was invalid when it totally distorted the lodestar approach to fee awards by awarding counsel three times the amount they advanced for costs regardless of their actual legal contributions to the case.

3. Was the Court of Appeals correct in holding that a fee-sharing arrangment in a

class action suit was invalid under which counsel was paid on the basis of a multiple of costs advanced since it created potential conflicts with the class by encouraging counsel to settle at the earliest possible moment as soon as their return on their investment was guaranteed, even if the class might do better if the case went to trial.

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STATEMENT OF THE CASE

Preliminary Statement on Non-Relationship Among Various "Agent Orange" Cases.

This case is one of ten separate appeals decided by the Second Circuit Court of Appeals growing out of the "Agent Orange" product liability litigations (reported at 818 F.2d 145, 179, 187, 194, 201, 204, 210,

216, 226, and 821 F.2d 139), in six of which Petitions for Certiorari have been filed in this Court. Although all of the cases bear the same name, they are not legally dependent on each other in any way, and each reported decision involves different parties and distinct and independent legal issues. Thus a grant of certiorari in one case (or a decision to defer the grant) should in no way affect a decision whether to grant certiorari in another, and, in particular, in this case.

Thus the appeal by Dow Chemical Co. (Dow Chemical Co. v. Ryan, No. 87-224, reported at 821 F.2d 139) involves the unsealing of certain discovery materials from a protective order entered by the District Court early in the litigation. A second appeal (Adams v. United States, No. 87- , reported at 818 F.2d 201) involves a suit by wives and family members of Vietnam veterans directly against the United States under the Federal Tort

Claims Act, which was dismissed on the basis of the Feres doctrine (United States v. Feres, 349 U.S. 135 (1950)). A third case (Hogan v. Dow Chemical, and Fraticelli v. Dow Chemical, No. 87-438, reported at 818 F.2d 210) involves an appeal by a civilian doctor and certain civilian residents of Hawaii whose cases were dismissed on procedural grounds or because of the discretionary function exemption of the Federal Tort Claims Act. A fourth case (Lombardi et al. v. Dow Chemical, No. 87-436, reported at 818 F.2d 187) involves the dismissal of the claims of veterans who had opted out of the class action against the chemical companies. A fifth case (Pinkney et al v. Dow Chemical, No. 87-437, reported at 818 F.2d 145) involves a challenge to the settlement between the veteran class and the chemical company defendants.

The final appeal involves the instant case, a challenge by two lawyers to the invalidation by the Second Circuit of a fee sharing arrangement previously entered into by the nine members of the Plaintiffs' Management Committee, on the ground that the arrangement totally distorted the appropriate fees to be paid to class counsel and otherwise could create a conflict between counsel and members of the class.

It is clear by the brief description of the cases -- and will surely be apparent by review of the Petitions themselves -- that this Court's disposition of any petition for certiorari will not effect the decision whether or not to accept another case for review and should in no way affect the decision on this Petition.

Background

This appeal involves the validity of a fee sharing arrangement entered into by nine

members of the Plaintiffs' Management Committee (PMC), the managing attorneys representing the veteran class in the litigation against the chemical companies manufacturing the chemical product "Agent Orange," a defoliant used in the Vietnam War containing dioxin. (Although there were nine members of the PMC and seven sought to upheld the validity of the agreement below, only two members of the PMC, Newton Schwartz and John O'Quinn, are seeking to appeal the Second Circuit decision to this Court). That case was eventually settled for $180,000,000 (818 F.2d 145) and the reasonableness of that settlement, upheld by the Circuit Court, is before the Court in another matter, No. 87-437.

The fee sharing arrangement was entered into in December, 1983 at a time when funds were needed to maintain and continue the law suit, with trial imminent. David Dean,

respondent here, had been a member of the original panel of class counsel, and had been closely involved with the Agent Orange litigation since its inception in October, 1979 and was appointed to the PMC in 1983. He was also appointed lead trial counsel by the district court in October, 1983 and court spokesman for the PMC.

In light of the need for new counsel and funds to prepare the case for trial, the PMC was expanded in the fall of 1983 to nine members. Six additional counsel came into the case and joined the PMC, each agreeing to contribute (more precisely, to invest, as explained below) up to $200,000 (later increased to $250,000) to the PMC to cover necessary expenses of the litigation. But they insisted as a condition of their contributions that they would get a "three for one" return on each dollar contributed for expenses, which would be paid out of the

total pool of attorneys' fees awarded to PMC members upon successful completion of the action (818 F.2d at 218; Petition for Certiorari 4a-5a). 1 In other words, each attorney investing $250,000 for expenses would obtain $750,000 off the top of the total attorneys' fee pool awarded to the PMC, amounting to a net profit of $500,000, regardless of the hours he put into the case. In addition, the remaining portion of the fees would be divided on a 50-30-20 ratio

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1 The original December, 1983 agreement also provided that that the fees remaining after the "three-for-one" investment payouts would be divided on a 50-30-20 percent formula: 50% would be equally divided among the nine PMC members regardless of the time each put into the case; 30 percent would be distributed according to the number of hours each member expended in the case and the final 20% would be divided in acccordance with certain quality and risk factors. As explained below, when the district court later expressed reservations about the 50-30-20 formula, the PMC members revised their agreement (in December, 1984) to eliminate that portion of the fee-sharing arrangment, and at the same time increased the contribution level for the original investors from $200,000 to $250,000. (818 F.2d at 218; Petition at 6a).

based on other factors (described above in footnote 1).

Less than six months thereafter, in May, 1984, the chemical company case was settled for $180,000,000. Counsel then made their application for counsel fees to the district court in September, 1984 and first disclosed the existence of the fee sharing arrangement to Judge Weinstein at that time; he expressed doubt about the propriety of the 50-30-20 formula which was then eliminated by counsel in the revised agreement. 2

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2 Petitioner Schwartz makes the absurd allegation that he had previously advised the court of the agreement in September, 1983 before the arrangment had been negotiated and signed. He alleges that he spoke to Special Master Sol Schreiber who had been appointed by the previous trial judge assigned to the case, then District Court (now Circuit Court) Judge George C. Pratt (who was succeeded by Judge Weinstein in October, 1983). Petitioner claims that he spoke to Special Master Schreiber about the matter in September, 1983 who advised counsel (1) to get the money from a bank rather enter into any "investment" scheme, and (2) not to tell Judge Pratt about it. (Petition for Certiorari at 5, 60a). On the face of it, the claim is an absurdity and internally inconsistent. The Special Master's

In January, 1985, the district court issued its opinion on counsel fees (reported at 611 F. Supp. 1296), granting a total of over $10,000,000 to all counsel and over $4.7 million to members of the PMC. The court awarded $1,424,283.75 to Respondent David Dean, granting him $150 per hour for 6,330 hours over five years, finding that he had displayed "an extraordinary level of skill and excellence" and merited a quality multiplier of 1.5. (611 F. Supp. at 1333). By contrast, Petitioner Newton Schwartz was awarded $41,886 for about 400 hours ($100 per hour with no multiplier). The other

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direction that the money should be borrowed from a bank can only be construed as advice that an investment arrangement whereby fees would be based on contributions could be viewed as improper. In any event, any informal exchange with the Special Master before the agreement was finally negotiated and signed could hardly be viewed as "disclosure" to the court. Petitioner had every opportunity to bring the final agreement before Judge Weinstein to determine its validity before any substantial portion of the money was actually contributed and spent.

Petitioner here, John O'Quinn, was awarded $132,576, also at the minimum rate of $100 per hour. The court commented as to both attorneys that they were never "particularly active" in the case, with most of their firm's work being done by associates. 611 F. Supp. at 1332-33.

Enforcement of the fee-sharing arrangement, however, would dramatically shift these amounts, as shown by the following chart, accepted by the court below (Petition, 8a) and the parties as accurately describing the effect of the agreement (the first three attorneys were noninvestors who would have to give back a significant portion of their fees and the latter six were investors who would obtain the "three for one" return):

	Amt of fees awarded by dist. ct	Amt of fees awarded under Agreement	Net effect of the Agreement
Dean	$1,424,283	$542,310	-$881,973
Schlegel	944,448	393,312	-$549,136
Musselwhite	344,657	206,991	-$137,666
Schwartz	41,886	513,026	+$471,140
O'Quinn	132,576	541,128	+$408,552
Brown	348,331	608,162	+$259,831
Locks	487.208	651,339	+$164,171
Chesley	475,080	647,534	+$172,456
Henderson	515,163	659,975	+$144,812

Looking at the hourly rates, the effect of the fee sharing arrangement would mean that Dean's hourly rate would be reduced from $225 per hour ($150 per hour plus 1.5 quality multiplier) to $85 per hour. And Petitioner Schwartz' hourly rate would be increased from $100 per hour to $1,224.00 per hour, while Petitioner O'Quinn's rate would go from $100 per hour to $408.16 per hour.

Proceedings Below:

In May, 1985, Respondent Dean moved to set aside the fee sharing arrangement on the ground that the arrangement totally distorted the fees payable to class counsel, violated

professional ethics and did not protect the rights of the class. In a decision issued on June 27, 1985, (reported at 611 F. Supp. 1452) the district court denied Respondent Dean's motion and upheld the agreement. It held that in this case there had been no conflict of interest between counsel and the class and the settlement was a fair one.

The district court based its decision on a finding that there was no violation of DR 2-107(A) which prohibits an attorney from splitting a fee with another attorney, since it viewed the PMC as an "ad hoc law firm," and the business realities of law practice in this type of case required a more flexible approach to the ethical requirements. The court also rejected the argument that the lawyers had acquired a "proprietary interest" in litigation which was prohibited by DR 5-103. It held that the investing lawyers did not have a proprietary interest in the case

as such but only in the final attorneys' fee pool paid to class counsel. The court also found that there was no conflict between counsel and the class since any incentive to settle early by the investor-lawyers (so that they could get their investment plus profit back at the earliest possible moment) would be offset by the noninvesting attorneys who had an interest in prolonging the litigation in order to obtain maximize fees under a lodestar formula. In this case, the court found that the settlement was fair and therefore any theoretical conflict between counsel and the class did not have any adverse effect on the outcome. In any event, the fact that the court was required to oversee the settlement prevented any abuse.

Recognizing that agreements of this kind could affect the fairness of settlements in class actions in the future, the District Court ordered that local Civil Rule No. 5 of

the Eastern District of New York should be amended to require class counsel to inform the court of any fee-sharing arrangements as soon as they are entered into, in order to minimize the possibility of conflict between counsel and the class.

On appeal, the Second Circuit reversed. The Court of Appeals found that fee-sharing arrangements of this kind so totally distort the calculation of reasonable fees payable to class counsel that they cannot be upheld. It noted that tying the fee to the amount advanced for expenses "completely distorted the lodestar approach to fee awards." 818 F.2d at 222, Petition 14a. The basic method of calculation of attorneys' fees in class action, equitable fund cases is the "lodestar," under which the number of hours reasonably expended is multiplied by the reasonable hourly rate. The only basis for adjusting the lodestar upwards, the Court

said, is because of the exceptional quality of an attorney's work. However, to adjust it upwards by a multiple of twelve (Schwartz' award of $41, 886 increased to $513,026) and to decrease the reasonable fee to Dean by two-thirds because money was invested in the lawsuit at a "three for one" return was to totally undermine the lodestar method. It would award "windfall fees" and in any event, would give the "appearance of having done so," prohibited by the case law on equitable fund cases, 818 F.2d at 222, Petition at 13a, quoting from City of Detroit v. Grinnell Corp., 495 F.2d 448, 469 (2d Cir. 1974).

The Court of Appeals also found that arrangements of this kind created a serious potential for conflict with the rights of the class whom counsel was representing. The court noted that investing attorneys had the greatest incentive for settling early, regardless of how the settlement would affect

the interest of the class. "Moreover, as soon as an offer of settlement to cover the promised return on investment is made, the investor attorney will be disinclined to undertake the risks associated with continuing the litigation." 818 F.2d at 224, Petition at 17a.

The fact that the court would be required to assess the overall reasonableness of the settlement does not sufficiently protect the interests of the class against possible abuses of this kind of arrangement, the Court said. "The test to be applied is whether, at the time a fee-sharing arrangement is reached, class counsel are placed in a position that might endanger the fair representation of their clients and whether they will be compensated on some basis other than for legal services performed." 818 F.2d at 224, Petition at 18a. At the end of the case when only the fairness

of the settlement is under review, it is too late to determine whether the process by which the settlement was reached was fair to the class and whether class counsel were motivated by other considerations in approving the settlement. "The conflict was especially egregious here, since six of the nine PMC members were investing parties to the agreement." 818 F.2d at 224, Petition at 18a.

In addition, courts must consider "the potential public misunderstanding they may cultivate in regard to the interests of class counsel," 818 F.2d at 225, Petition at 20a. The fact that individual members of the class of Vietnam veterans will get a relatively small amount but that one counsel would receive over twelve times the amount that the district court found his services were worth "provides additional justification for invalidating the agreement and applying the

lodestar formula," 818 F.2d at 225, Petition at 20a.

Summary of Argument

There is absolutely no basis for the grant of certiorari in this case. The fee-sharing arrangement at issue here involves such an idiosyncratic fact situation that it is impossible to imagine a similar pattern arising again. There is no "conflict" among the circuits on this issue since this kind of arrangement has never been examined by any court anywhere and the existing case law on other types of fee-sharing agreements is not remotely relevant.

Furthermore, the Court of Appeals was obviously correct in holding that attorneys' fees should never be based upon the "investment" that a lawyer makes in a law suit since it would totally distort the proper method for determining a reasonable

attorneys fee. Finally the court was correct in pointing out the potential conflict which such arrangements create with members of the class, whose interests the attorneys are obliged to protect.

ARGUMENT

POINT I

THERE IS NO CONFLICT IN THE CIRCUITS WITH RESPECT TO THE LEGALITY OF FEE-SHARING ARRANGEMENTS OF THE KIND AT ISSUE HERE

The chief basis for requesting certiorari in this case is that the decision below allegedly creates a conflict in the circuits, in particular, with the Third Circuit decision in Lindy Bros. Builders, Inc v. American Radiator and Standard Sanitary Corp., 487 F.2d 161 (3d Cir. 1973)("Lindy I"), on remand, 382 F. Supp. 999 (E.D. Pa. 1974), appeal after remand, 540 F.2d 102 (3d Cir. 1976)(en banc)("Lindy II"). Petitioners support this assertion only by selective

citation from the case and by failing to describe the actual holding.

Lindy II did not involve a fee-sharing arrangement under which attorneys would share their fees based upon a multiple of the costs or expenses contributed to the case. Indeed, no case has been found or cited by any party or by the courts below in which lawyers agreed to share fees based upon that consideration.

In Lindy II two law firms (the Berger firm and the Kohn firm) had agreed to split the total fees paid to them on a 50-50 basis. A group of previously unrepresented claimants who were required to contribute to the attorneys' fee fund objected to award of any amount to the Berger firm since the district court had originally concluded that it was entitled to only $139,000 for the fair value of its services but would get $893,000 under a new calculation of fees. However, the

increase in fees was not due solely or significantly to enforcement of the 50-50 agreement. Rather the increase was due to the fact that certain private clients benefited by the settlement were to contribute $861,191 directly to the attorneys' fee pool (see 540 F.2d at 108, 382 F. Supp. at 1028, n. 34). In addition, the district court recalculated the value of the services performed by the Berger firm, noted the valuable contribution it had made in consultation and review with the Kohn firm and held that higher amounts requested were justified. 540 F.2d at 109.

That holding -- which simply reapplied the basic lodestar method of calculating a reasonable fee and emphasized that the fee must be based on the reasonable value of the legal services contributed toward successful resolution of the case -- does not in any way conflict with the holding of the Second Circuit below which held that fees cannot be

based primarily on the financial investment made by a lawyer in the case.

The other district court cases cited by the Second Circuit and cited by Petitioner stand for the uneventful proposition that after the basic lodestar method determines the final fees to a group of attorneys, some finetuning and adjusting of the final fees may be made among the attorneys working on the case to more accurately reflect their contributions to the final outcome so long as the adjustment and the final fees paid to each attorney is close to the lodestar amounts established by the court and reasonably reflects the value of their legal services to the case. 3 Thus the Court below explained:

3 The cases cited include: Ruskey v. Jensen, No. 71-3169, slip opinion at 10-13 (S.D.N.Y. Sept. 18, 1981); In re Magic MArker Securities Litigation, [1979 Transfer Binder] Fed.Sec.L.Rep. (CCH) Par. 96,116 at 96,195 (E.D. Pa. Sept. 16, 1979); Valente v. Pepsico, Inc, [1979 Transfer Binder] Fed.Sec.L.Rep. (CCH) Par. 96,921 at 95,863

> A careful examination of those decisions permitting internal fee agreements to govern the distribution of fees reveals no case where return on investment was a factor. More important, in a number of these cases the courts apparently assumed that the internal fee sharing agreement would be based substantially on services rendered by individual counsel. 818 F.2d at 223; Petition at 15a

The Court below concluded that any fee sharing agreement "must comport with those principles of fee distribution set forth in Grinnell I and Grinnell II." 818 F.2d at 223; Petition at 16a. In another words, a fee-sharing arrangement between counsel that deviates slightly from the lodestar established by the court may be permissible under some circumstances when the lawyers involved try to more accurately gauge the value of their services to the case, but it "must bear some relationship to the services

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(D. Del. June 4, 1979), appeal dismissed, 614 F.2d 772 (3d Cir. 1980); In re Ampicillin Antitrust Litigation, 81 F.R.D.395, 400 (D.D.C. 1978); Del Noce v. Delyar Corp., 457 F. Supp. 1051, 1055 (S.D.N.Y. 1978).

rendered," and not to the investment of money. Ibid.

No case anywhere holds to the contrary and thus there is no conflict in the circuits to justify the grant of the petition here.

POINT II

A REASONABLE FEE CANNOT BE BASED UPON A LAWYER'S INVESTMENT IN A CASE.

The one aspect of the Second Circuit's opinion which is not even mentioned by the Petitioners is the holding that the fee-sharing arrangement at issue here is improper because it "completely distorted the lodestar approach to fee awards," 818 F.2d at 222; Petition at 14a. 4 In equitable fund cases,

4 Rather than discuss this issue, Petitioners emphasize their erroneous assertion that disclosure was made to the court through the apparently informal discussion with the Special Master before the agreement was finally entered into. Aside from the fact that this assertion is internally inconsistent, as explained above, and cannot bear the weight Petitioners would give it, it

an attorney who creates a fund for the benefit of a class "should receive reasonable compensation from the fund for his efforts." Ibid. Under the Second Circuit rule in Grinnell II, the determination of the fee is based upon the "actual effort made by the attorney to benefit the class," Grinnell II, 560 F.2d at 1099.

To measure that effort it is necessary to make an evaluation of the legal services contributed by the attorney, which in turn is measured by the number of hours he reasonably expended in the successful outcome of the case multiplied by his reasonable hourly fee. It cannot be based on the money he invested, since that would make lawyers "insider traders" with a vengeance inasmuch as outsiders (both civilians and

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has absolutely no bearing on whether the fees were unreasonable because of their distorting effect on the lodestar. Thus the assertion about disclosure, as feeble as it is, has no effect upon this aspect of the Court's decision.

nonlitigating lawyers) would commit a crime if they attempted to invest in such a suit. See N.Y. Judiciary Law, Sect. 478 et seq. (criminal prohibition on champetry). See also DR 3-102(A)(lawyer shall not share fees with nonlawyer).

In setting the fees in this case, the court below carefully examined counsels' fee petitions and arrived at individual awards based upon the proper Grinnell factors and by evaluating the services each had provided for the class. But the threefold return of advanced expenses tototally distorted and made meaningless consideration of the individual fee petitions. The lodestar requirement is established not only to determine what the clients and the class should pay as a total fee, but what each individual attorney should receive for his services. As the Court said in Grinnell II, 560 F.2d at 1098: an attorney should be

"compensa[ted]... for the reasonable value of services ...benefitting the claimant."

Petitioners claim that their contribution of funds was very important in leading to the successful outcome of the case and that the amount of out-of-pocket expenses advanced for the litigation should be considered in increasing the lodestar. Petition at 17. That assertion is a non sequitur. It is for the court to evaluate the services rendered by an attorney and the whether an increase in the lodestar is justified based on the advance of expenses, not the attorneys enforcing a private agreement that totally distorts the fees and creates serious risks of conflict with the class. And no court has ever held that the "services" contributed by an attorney which justifies an increase in the lodestar should include the money he invested in the case or that the lodestar could be increased

twelvefold for one attorney because of that investment.

POINT III

THE FEE SHARING ARRANGEMENT CREATED THE POTENTIAL FOR A SERIOUS CONFLICT OF INTEREST WITH THE CLASS AND MUST BE INVALIDATED ON THAT BASIS

The alternate holding of the Court below was that the fee-sharing arrangement created a clear potential for conflict of interest with the class members. This is expecially true in a class action case where full disclosure to the "client" and consent is difficult and frequently impractical to obtain.

In this case, at the time the agreement was entered into, there was a strong "potential for abuse [which] should have been discouraged." 818 F.2d at 224; Petition at 17a. The court explained:

> The conflict obviously lies in the incentive provided to an investor-

> attorney to settle early and thereby avoid work for which full payment may not be authorized by the district court. Moreover, as soon as an offer of settlement to cover the promised return on investment is made, the investor-attorney will be disinclined to undertake the risks associated with continuing the litigation. 818 F.2d at 224; Petition at 17a.

Those risks are not mitigated by the supervision that the court exercises over approval of the settlement. At that point when the case is virtually over, the court cannot reexamine the process by which the settlement was arrived at to determine the effect of the fee-sharing arrangement. At that point it would be difficult to determine whether class counsel had fulfilled its obligation to the class or the extent to which counsel had allowed their own interests to influence their decision to accept a settlement. The pressure to accept the settlement at that point is considerable and other administrative concerns make it difficult for the court "to assure that the

ongoing intersts of the class are protected." 818 F.2d at 224; Petition at 19a.

Contrary to Petitioners' assertion, the current situation is totally different from the common contingency fee arrangement which is specifically sanctioned by DR 5-103. When an attorney agrees to accept one-third of the total amount secured in a case, both the attorney and the client have the same incentive to achieve the highest possible verdict or settlement. But here that is not true. So long as the settlement covers the investment and the promised return, the attorney is less interested, if he is interested at all, in getting more money for his client, the class or in "undertaking the risks associated in continuing the litigation." 818 F.2d at 224; Petition at 17a-18a.

The current system for determining a reasonable fee for an attorney contains

built-in incentives for insuring that the attorney will obtain the best results for the class. The current multiplier factors put a premium upon lawyers taking cases without bright prospects, doing the highest quality legal work, and getting the best results. If that is accomplished, an attorney can get quality and result multipliers, to the benefit of himself and his clients. But a fee- sharing arrangement based on a promised return on investment destroys the incentive for both the investor and noninvestor lawyers by making decisive the amount of money contributed and not the effort and quality of work of the attorneys. As the Fifth Circuit said in Zylstra v. Safeway Stores, 578 F.2d 102, 104 (5th Cir. 1978): "[W]henever an attorney is confronted with a potential for choosing between actions which benefit himself financially and an action which may benefit the class which he represents, there

is a reasonable possibility that some specifically identifiable impropriety may occur." A court cannot wait to deal with that impropriety on a case by case basis, but must discourage arrangements that will create a substantial liklihood that conflicts may arise.

The fee-sharing arrangement raises substantial ethical problems under both DR 5-103 (prohibiting an attorney from acquiring a proprietary interest in litigation) and DR 2-107(A) (prohibiting fee-splitting with lawyers in another firm).

It is difficult to see how this investment of money is anything other than the acquisition of a "proprietary interest" in a case, prohibited by the ethical rule. Moreover, the fee splitting arrangement here is far worse than the typical "forwarding fee" payment long condemned by the rules. In a forwarding fee situation a lawyer often

contributes guidance, assistance and client hand-holding, uniquely legal functions that advance the case. But fee splitting based only on investment has no such redeeming features and does not involve any legal service.

CONCLUSION

Invalidation of the fee-sharing arrangement by the Court below created no windfall for any attorney, but only leaves each attorney precisely in the position that the courts below determined their efforts were worth under traditional lodestar analysis. It is the Petitioners who extracted onerous conditions for their investments and now seek to make a windfall after they contributed virtually nothing in the way of legal servies to the case. The decision below

was eminently correct and should not be examined or disturbed.

Dated: October 4, 1987

Leon Friedman
Hofstra Law School
Hempstead, N.Y.
11550
(212) 737-0400
Attorney of Record